defense UPDATE

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EXAMINING PRIVILEGE LOG DESCRIPTIONS IN FEDERAL LITIGATION

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I. INTRODUCTION.

The protections afforded under the attorney-client privilege and the work product doctrine are justified under a common rationale: an attorney cannot provide, and a client cannot receive, full and adequate representation unless certain matters are prohibited from disclosure to the client's adversaries. The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interest in the observance of law and administration of justice." *Upjohn Company v. United States,* 449 U.S. 383, 389-391 (1981). The purpose of the work product doctrine is to encourage careful and thorough preparation by the attorney without concern that the attorney's files and mental impressions, at least to some extent, are protected from invasion by, and disclosure to, the opposing side. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Consequently, an inherent tension exists between the duty of parties responding to discovery to produce all information and materials that are relevant to, or reasonably calculated to lead to the discovery of admissible evidence concerning, any issue in the case and the duty of counsel to preclude disclosure of relevant but privileged information and materials. This tension is regularly a subject of discovery disputes in federal litigation.

When the December 1, 1993 amendments to the Federal Rules of Civil Procedure became effective, new Rule 26(b)(5) dictated for the first time when and how litigants were to assert claims of privilege. The rule codified the practice of a number of federal district courts that required parties to expressly claim the privileged status of certain documents on a "privilege log" and to describe the material withheld in a manner sufficient to permit an opponent to assess the validity of the assertion of the privilege. Although Rule 26(b)(5) has been in effect for almost ten years, the Eighth Circuit and the federal district courts in Iowa have rarely dealt in their published decisions with the appropriate standards parties are to use in constructing privilege logs, and subsequently defending challenged claims of privilege or work product protection.

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MESSAGE FROM THE PRESIDENT

Mike Weston

Selling Iowa

Recruiting season is right around the corner. Lawyers around the state will be searching for the right candidates to become the defense lawyers of tomorrow. Iowa is increasingly a hard sell to young lawyers. The Drake and Iowa law schools attract a national class of students. Recruiters from regionally and nationally known firms pull lawyers away from our state. Young people increasingly hesitate to make a career out of the trial practice, a practice that they perceive is full of stress and strain with uncertain reward. So we, as the legal employers in the state, have an uphill battle. Here are some points to consider when you sell Iowa to the defense attorneys of tomorrow.

1. Iowa has the best judges in the country. Iowa judges to a person are talented, fair, and impartial. It is seldom that we can say that our clients have been treated unfairly. Even in losing positions or cases, our clients typically understand why. This is no accident. For years our judges have been appointed and not elected. Judicial candidates appear before nominating commissions made up of distinguished members of the bar and lay public. Although there is a political twist to the process, it does not interfere with the appointment of outstanding jurists. Young lawyers will be welcomed by the bench who appreciate the relationship they have with the working trial bar.

2. Iowa businesses get fair trials in Iowa. You have no doubt read or heard of the report of the United States Chamber of Commerce Institute for Legal Reform and its ranking of the treatment of businesses in the liability system of each state. Iowa ranked third best in the nation in 2003 after ranking fifth in 2002. Factors such as the overall treatment of tort and contract claims, judicial performance, jury fairness, and punitive damage treatment were considered. For defense lawyers this is heartening news. We can tell our prospective colleagues that our business clients get fair trials in Iowa. This is not the case in many other states. Recently, I spent time with lawyers from around the country at the IADC Trial Academy in Boulder, Colorado. The stories they told about the plight of businesses on trial in their states were frightening. I am sure you have heard them. Young defense lawyers who come to Iowa will compete on a level playing field.

3. The defense bar in Iowa is well respected. In courthouses throughout the state, members of the defense bar advance their clients' causes professional and competently. Each and every day we present well reasoned positions on the legal issues we confront, all of which are critical to the court's view of the evolution of our common law. We consistently

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NEW ASSISTANCE FOR DEFENDING PUNITIVE DAMAGES CLAIMS IN IOWA — THE "MARCHING ORDERS" OF *STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY V. CAMPBELL*

By: Thomas D. Waterman, Lane & Waterman, Davenport

The decision this Spring in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), has been hailed by defense counsel as "a momentous … victory for insurers, corporations, and wealthy individuals throughout the land who face exposure to punitive damages."[1] *Campbell* marks only the second time the U.S. Supreme Court has reversed a judgment on a jury verdict for punitive damages as unconstitutionally excessive.[2] In *Campbell*, a six-three decision, the majority opinion authored by Justice Kennedy[3] held that a punitive damages award of $145 million on bad faith claims violated the Due Process Clause of the U.S. Constitution where the compensatory damage judgment was only $1 million. 123 S.Ct. at 1517, 1526. The majority opinion clarified the guidelines for appellate *de novo* review of punitive damages awards under the federal constitution. *Id*. at 1520-26. Indeed, Victor Schwartz, general counsel for the American Tort Reform Association, described *Campbell* as "the most significant punitive damages decision the supreme court has ever issued because it contains specific guidelines" lacking in the Court's earlier cases.[4] Justice Ginsberg's dissent noted acerbically that the *Campbell* majority's guidelines "begin to resemble marching orders." *Id*. at 1531. This article reviews *Campbell* and examines the assistance its "marching orders" can provide to Iowa practitioners defending punitive damages claims.

The underlying facts in *Campbell* involve a classic case of an insurer's bad faith refusal to settle a liability claim within policy limits. State Farm's insured, Curtis Campbell, attempted to pass a six-van caravan on a two-lane Utah highway, forcing an oncoming driver off the road and into a collision with another vehicle, killing one driver and crippling the other (the Campbell's car avoided any impact). *Id*. at 1517. State Farm declined opportunities to settle the resulting lawsuits for Campbell's policy limits of $50,000, and denied liability, even though its own investigators had quickly concluded Campbell's unsafe pass caused the accident. *Id*. at 1518. Disregarding "the overwhelming likelihood of liability and the near-certain probability of an excess judgment," *Id*. at 1521, State Farm took the case to trial, telling Campbell his assets were not exposed and that he did not need separate counsel. *Id*. at 1518. The jury found Campbell 100 percent at fault and returned a verdict of $185,000 against him. *Id*. State Farm initially refused to pay the judgment or post an appeal bond, and instead suggested to Campbell that he sell his home. *Id*. At that point, Campbell hired his own lawyer, who settled with the tort victims by assigning to them ninety percent of any recovery on bad faith claims Campbell agreed to pursue against State Farm. *Id*. After the original tort judgment was affirmed on appeal, State Farm paid it, including the amount in excess of policy limits. *Id*.

Campbell's bad faith claims proceeded in Utah state court. Extensive evidence was introduced over State Farm's objection as to its national claim handling practices and conduct; essentially, State Farm was put on trial as a corporate bad actor. *Id*. at 1521-22. Justice Ginsburg's dissent painstakingly reviewed the evidence of State Farm's nationwide misconduct. *Id*. at 1527-31. The majority observed that the case "was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country." *Id*. at 1521. The evidence apparently resonated with the bad faith jury, which returned a verdict against State Farm of $2.6 million in compensatory damages and $145 million in punitive damages. *Id*. at 1519. The trial judge reduced the compensatory award to $1 million and the punitive award to $25 million. *Id*. The Utah Supreme Court, however, reinstated the jury verdict of $145 million in punitive damages. 65 P.3d 1134. The U.S. Supreme Court granted certiorari and reversed the Utah Supreme Court, remanding the case with instructions to enter a new punitive award, "at or near" the $1 million compensatory award. *Id*. at 1526.

Campbell makes clear that both state and federal appellate courts are constitutionally required to conduct a *de novo* review of punitive damages awards under the due process clause. *Id*. at 1520-21. The *Campbell* majority reiterated three "guideposts" for reviewing punitive damages awards:

> (1) the degree of reprehensibility of the defendant's misconduct;
> (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive

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[1] Michael J. Brady, "A New Predictability in Punitive Damages?" *FOR THE DEFENSE*, June, 2003 at 10.

[2] The first time was in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (rejecting a $2 million punitive damages award accompanying a $4,000 compensatory damage award).

[3] Chief Justice Rehnquist, and Justice Stevens, O'Connor, Souter, and Breyer joined the majority decision. Justices Scalia, Thomas and Ginsburg filed separate dissenting opinions.

[4] Quoted by John Gibeaut, "Pruning Punitives — High Court Stresses Guidelines for Deciding Damages." ABA JOURNAL, June, 2003 at 26.

THOUGHTS ON DEFENSE OF THE EMPLOYMENT CLAIM

By: Mark L. Zaiger, Shuttleworth & Ingersoll, P.C., Cedar Rapids, Iowa

INTRODUCTION

The development of employment law has engrafted upon employer decision making a large and diverse group of limitations. Some of those limitations are statutory, some result from common law development. Court decisions continue to say that at-will employment permits termination of the employment relationship "at any time, for any reason, or for no reason at all", *Boerschell v. City of Perry*, 512 N.W.2d 565, 566 (Iowa 1994), and that the concept of at-will employment is "firmly rooted in Iowa law". *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 455 (Iowa 1989). The Iowa courts refer to "only two narrow exceptions" to the rule. *Id.*; *Alderson v. Rockwell Int'l Corp.*, 561 N.W.2d 34, 36 (Iowa 1997). As a practical matter, however, the crazy quilt of statutory and judge-made exceptions to the at-will employment doctrine may threaten to swallow the doctrine.

Because of the way that employment law has developed, the judicial and statutory restrictions on employers overlap, vary depending upon geography or type of employer, are based upon different (or even conflicting) policy sources and employ different remedial schemes and administrative and procedural approaches. Attempting to generalize about the defense of employment claims (and the various legal theories that are asserted) can, therefore, be difficult. Nonetheless, notwithstanding the broad diversity of legal theories available in employment cases and widely varying legal standards, some common elements remain.

Typically, the ultimate question to be litigated in an employment case is whether the employer had the authority to terminate the employment relationship (or whether the circumstances of plaintiff's departure from employment constitute a constructive discharge for which the employer may be held responsible). Further, employment claims at the administrative level or as asserted in court tend to focus upon procedural issues more than on substantive issues. Generally, society agrees that it is for an employer to determine how many employees it needs, and which ones. Ultimately, the result is often that plaintiff's counsel presents as a main question in the litigation the route chosen by the employer and, only indirectly, the destination. Consistency and adherence to procedures (and the expectation that there should be procedures) are therefore common themes throughout most employment cases. More importantly, a common factor applicable to most employment claims is a practical requirement for employer conduct. The requirement does not match a legal standard in statutory or case law. No matter the type of claim being asserted, juries (and, to a lesser extent, administrative agencies and judges) require that the employer act fairly. Any lawyer defending an employment claim who cannot keep this notion firmly fixed is inviting trouble.

Because of the common themes applicable in most employment cases, certain obstacles and opportunities repeatedly present themselves. Those obstacles and opportunities suggest a fairly consistent set of strategies that apply across diverse employment claims at various points in the process.

THE EMPLOYMENT CLAIM

Evaluating the Claim

An employment claim can arise at various points. For example, an internal complaint of an unlawful hostile environment, no less than an administrative charge of discrimination or even litigation, should be treated as a legal claim requiring appropriate response. Sometimes, counsel advises as the facts develop that will later be involved in the case. Other times, that opportunity is not available. Regardless of the way in which the claim originates, however, similar factors should be considered:

- Does the employer harbor a false sense of security because the employee is at-will? Make sure the client understands that, many times, the at-will employment rule exists more on paper than it does in reality and that employment claims can arise under a very broad range of circumstances;
- From the start, think in terms of potential exhibits. Every scrap of paper may end up in court;
- Do what you can to keep the client from becoming too personally involved. Objectivity remains the key;
- Determine whether the employee was provided fair notice of the performance level or conduct expected. Check carefully with the client to make certain that the behavior expected was, in fact, reasonable and possible for an employee performing the requirements of the job;
- Confirm that the approach the client took is procedurally consistent with other potentially comparable situations;
- Consider the proportionality of the penalty with the offense, prior history and overall consistency;
- In situations in which the problem

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This article first examines the requirements of Rule 26(b)(5), and the guidance provided by the Advisory Committee concerning the timing and adequacy of claims in privilege logs. The article next reviews the more significant decisions of the Eighth Circuit and other federal courts concerning the use of privilege logs when a party challenges another party's claims of privilege. Finally, the article examines judicial responses to the requirements of a detailed description in privilege logs, and circumstances under which an inadequate privilege log may result in waiver of the claimed privilege.

II. STANDARDS FOR PRIVILEGED DOCUMENT LOGS.

Prior to the amendments of December 1, 1993, the Federal Rules of Civil Procedure did not require express claims of privilege during discovery. The requirement of a privilege log for parties to litigation was encapsulated in Federal Rule of Civil Procedure 26(b)(5). That rule provides:

> (5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Two years earlier, Federal Rule of Civil Procedure 45 had been substantially amended. Amended Rule 45(d)(2) imposed upon persons responding to a subpoena duces tecum a duty to produce a privilege log identifying all documents subject to the subpoena that are withheld on a claim of privilege or protection as trial preparation materials, together with a description "that is sufficient to enable the demanding party to contest the claim." Although the Iowa Rules of Civil Procedure have not adopted or incorporated the privilege log requirement of Federal Rule of Civil Procedure 26(b)(5) in state court discovery practice, reported state court decisions occasionally refer to the use of privilege logs by parties. *E.g., Exotica Botanicals, Inc. v. E. I. Du Pont de Nemours & Co., Inc.*, 612 N.W.2d 801, 804 (Iowa 2000). Moreover, Iowa Rule of Civil Procedure 1.1701(3)(b) incorporates almost verbatim the privilege log requirement of Federal Rule 45(d)(2) for persons responding to subpoenas. The attorney confronted with discovery requests or subpoenas that encompass privileged documents must first determine the timing of the production of a privilege log and then assess the sufficiency of the information necessary to sustain the claim of privilege.

A. Timing of Production of Privilege Logs.

Federal Rule 26(b)(5) states the privilege log must be produced "[w]hen a party withholds information otherwise discoverable under these rules . . . ." Consequently, the obligation to provide a privilege log is arguably triggered initially by Rule 26(a)'s requirement of initial disclosures and certainly by interrogatories and requests for production of documents that are served after an initial disclosure. It is only at those points that a party "withholds information otherwise discoverable." Strictly speaking, Federal Rule of Civil Procedure 26(a)(1)(B) does not mandate the production of any documents. Rather, a party is required to describe by category and location all documents, data compilations, and tangible items that are in the possession, custody, and control of the party that the disclosing party may use to support its claims or defenses. Fed. R. Civ. P. 26(a)(1)(B). At a minimum, the party withholding documents on claims of privilege must produce a privilege log at the time non-privileged or protected documents are produced to the opposing party, unless the parties have otherwise agreed to the timing of assertions of claims of privilege, or the Court has specified such a time in its scheduling order or other case management orders. *E.g., In re Grand Jury Subpoena*, 274 F.3d 563, 575-76 (1st Cir. 2001) (subpoena case; privilege log should be produced when documents are withheld at time other documents are produced); *Jones v. Hamilton County Sheriff's Department*, 2003 WL 21383332, p. 4 (S.D. Ind. June 12, 2003) (failure to produce privilege log at time of service of discovery responses held improper). Particularly in complex litigation involving voluminous documents, the parties and the court may wish to specify the timing of service of privilege logs to ensure that sufficient time is allocated for the resolution of challenges to claims of privilege.

The obligation of a party under Rule 26(e) to supplement or correct an initial disclosure or discovery response also

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applies to privilege logs produced under Rule 26(b)(5). A privilege log is a portion of a response to a discovery request, and the duty of supplementation is triggered when the responding party learns the party's prior response is incomplete or incorrect. Fed. R. Civ. P. 26(e)(1), (2). Consequently, when a party learns that in some material respect the documents produced are incomplete, or if additional documents are made known during the course of discovery, a party may need to supplement both its document production and its description of privileged documents.

Persons responding to a subpoena duces tecum must act more quickly in asserting the person's claim of privilege on a privilege log. Under both Federal Rule 45(c)(2)(B) and Iowa Rule of Civil Procedure 1.1701(2)(b)(2), a person commanded to produce and permit inspection of documents must comply within 14 days after service of the subpoena, or before the time specified for compliance if such time is less than 14 days after service. Alternatively, the responding person must serve any written objections to the subpoena within that time. The texts of both the federal and state rules expressly condition the service of an objection to a subpoena duces tecum upon compliance with the rule requiring express claims of privilege. Fed. R. Civ. P. 45(c)(2)(B); Iowa R. Civ. P. 1.1701(2)(b)(2). In other words, a person objecting to compliance with a subpoena duces tecum on grounds of privilege must produce a privilege log at or within the time the person serves objections to the subpoena under the literal terms of the rule.

As a practical matter, however, some courts have characterized as unclear the language of Rule 45(d)(2), at least as to the issue of when the privilege log must be produced. *E.g., Goodyear Tire & Rubber Company v. Kirk's Tire & Auto Servicenter of Haverstraw, Inc.,* 211 F.R.D. 658, 661 (D. Kan. 2003) (citing cases). Some courts have permitted a subpoenaed non-party to provide the information requested by Rule 45(d)(2) after filing objections under Rule 45(c)(2)(B) or a motion to quash. *E.g., Minnesota Sch. Bds. Ass'n Ins. Trust v. Employers Ins. Co. of Wausau*, 182 F.R.D. 627, 629 (N.D. Ill. 1999); *see also Tuite v. Henry*, 98 F.3d 1411, 1416 (D.C. Cir. 1996). Consequently, a number of courts hold that a privilege log under Rule 45(d)(2) will be considered timely if provided within a "reasonable time" as long as objections are asserted within the fourteen-day timeframe. *In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d Cir. 1998).

B. Adequacy of Information Contained in Privilege Logs.

Neither text of Federal Rules 26(b)(5) or 45(d)(2) provide much guidance regarding the amount of information required to be disclosed on a privilege log. As the Eighth Circuit has observed, "The tribunal ultimately decides what information must be disclosed on a privileged document log." *PaineWebber Group v. Zinsmeyer Trust Partnership*, 187 F.3d 988, 992 (8th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000). The Advisory Committee Notes to Rule 26(b)(5) stress the need for flexibility in determining the information that must be provided when a party asserts a claim of privilege or work product protection. The Committee observes that "details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld; but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories." Advisory Committee Notes, reprinted in FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, p. 154 (2003 ed. West). The Advisory Committee also notes that in certain rare circumstances, some of the pertinent information affecting applicability of the claim may itself be privileged, in which case the rule provides that such information need not be disclosed. *Id.* As one federal court has observed, "Privilege logs do not need to be precise to the point of pedantry. Thus, a party who possesses some knowledge of the nature of the materials to which a claim of privilege is addressed cannot shirk his obligation to file a privilege log merely because he lacks infinitely detailed information. To the contrary, we read Rule 45(d)(2) as requiring a party who asserts a claim of privilege to do the best that he reasonably can to describe the materials to which his claim adheres." *In re Grand Jury Subpoena,* 274 F.3d 563, 576 (1st Cir. 2001).

Rule 26(b)(5) and Rule 45(d)(2) necessitate a separate listing of each document withheld from production. For each document, the log must describe: (a) the date and type of document; (b) the names of the author(s) and recipient(s); (c) specification of the privilege(s) and/or protection(s) claimed for each document, *e.g.,* attorney-client, work product; and (d) a description of each document's general subject matter. *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001). Other courts also

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require such items as a description of the capacity of each author or recipient (*e.g.,* general counsel, outside counsel, vice president of manufacturing), the purpose for the document's creation, and a specific explanation of the reasons the document is privileged or protected from discovery. *Jones v. Hamilton County Sheriff's Dept.*, 2003 WL 21383332, p. 4 (S.D. Ind. 2003), *quoting Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992).

Disputes concerning the adequacy of the information presented in a privilege log usually center on whether the party resisting disclosure has described the documents in sufficient manner that "will enable other parties to assess the applicability of the privilege or protection," Fed. R. Civ. P. 26(b)(5), or in such a manner "that is sufficient to enable the demanding party to contest the claim," Fed. R. Civ. P. 45(d)(2). One court has ruled that the standard for testing the adequacy of a privilege log is "whether, as to each document, it sets forth specific facts that, if credited, would suffice to establish" the elements of the claimed privilege or protection. *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 474 (S.D. N.Y. 1993) (interior quotations omitted); *see also Allendale, supra*, 145 F.R.D. at 88. The focus is on the descriptive portion of the log and not on conclusory or blanket invocations of the privilege. *Bowne, supra,* 150 F.R.D. at 474; *Goodyear Tire, supra*, 211 F.R.D. at 661. Therefore, descriptions such as "letter re claim," "analysis of claim," or "report in anticipation of litigation" will likely be insufficient.

The party resisting disclosure often contends that the description is adequate in light of Rule 26(b)(5)'s admonition that the description need not reveal information itself privileged or protected. The battle lines are thus starkly drawn: The party seeking disclosure will likely push for as much detailed and specific information about the substance of the allegedly privileged document as it possibly can obtain, in the name of having sufficient information to assess the applicability of the privilege. At the same time, the party resisting disclosure will tend to restrict the information contained in the description of the document for fear that in supporting the party's claim of privilege, the very information sought to be protected will be disclosed.

1. Basic Information Required in Privilege Log Descriptions.

The party asserting the privilege as a bar to discovery bears the burden of proving a factual basis establishing the applicability of the privilege. *Rabushka exrel. United States v. Crane Co.*, 122 F.3d 559, 565 (8th Cir. 1997), *cert. denied,* 523 U.S. 1040 (1998); *In re Santa Fe Int'l Corp.,* 272 F.3d 705, 710 (5th Cir. 2001); *United States v. Construction Products Research, Inc.*, 73 F.3d 464, 473 (2d Cir.), *cert. denied,* 519 U.S. 927 (1996). The case law in both the Eighth Circuit and other federal circuits universally acknowledges that, although the texts of Rules 26(b)(5) and 45(d)(2) state that all information necessary to assess the claim of privilege should be provided in the privilege log, the practice of the courts has been otherwise. Indeed, the case law demonstrates that the privilege log is only the beginning of the inquiry: It functions primarily to provide sufficient detail to permit a judgment by the party seeking to challenge the applicability of the privilege to a particular document as to whether the document is at least *potentially* protected from disclosure. One court recently characterized the information on the privilege log as that which constitutes the "prima facie case" of the party asserting the privilege; the ultimate burden of persuasion on the applicability of the privilege as to each document must be met if and when this "prima facie case" is challenged. *AT&T Corp. v. Microsoft Corp.*, 2003 WL 21212614, p. 2 (N.D. Cal. 2003). When that challenge occurs, other required information-such as the relationship between the individuals listed in the log and the litigating parties; the relationship between individuals not normally within the privileged relationship; or the reason a communication that does not identify an attorney as either author or recipient is claimed to be privileged-is then typically supplied by affidavit or deposition testimony. *E.g., Rabushka, supra,* 122 F.3d at 565; *United States v. Construction Products Research, Inc.*, 73 F.3d at 473; *Bowne, supra*, 150 F.R.D. at 474.

In *Rabushka*, the Eighth Circuit dealt expressly, albeit cursorily, with the sufficiency of a showing in a privilege log. *Rabushka* involved, in part, the appeal of a district court's denial of certain motions to compel production of documents, which challenged the defendant's assertion of the attorney-client and work product privileges. The Court's treatment of the issue occurred in a single sentence: "Crane met its burden of providing a factual basis for asserting the privileges when it produced a detailed privilege log stating the basis of the claimed privilege for each document in question, together with an accompanying explanatory affidavit of its general counsel." *Rabushka, supra*, 122 F.3d at 565. The *Rabushka* opinion neither describes the number of documents challenged, the reason(s) Rabushka contended the Crane Company's privilege log was

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inadequate, the timing of the submission of the "explanatory affidavit," nor the types of information contained therein. Rather, Rabushka merely argued that some of the documents were not protected because they were prepared by Crane's general counsel acting in a capacity as corporate secretary rather than counsel. The Eighth Circuit observed that Rabushka simply offered "speculation" and no evidence to contradict Crane's evidence that the questioned documents were prepared while the attorney was acting in a legal capacity. *Id.*

The *Rabushka* decision did little to describe the degree of detail the Eighth Circuit would ultimately require in a privilege log. The decision nevertheless conveys an important lesson to counsel: the party asserting the privilege ultimately will be required to submit evidence (usually in the form of affidavits or deposition testimony) in support of the claim of privilege to successfully preclude production of the challenged document(s). The timing of the submission of such evidence was still unclear.

2. *PaineWebber Group, Inc. v. Zinsmeyer Trusts Partnership*

The function of the privilege log was examined again by the Eighth Circuit two years after *Rabushka* in *PaineWebber Group, Inc. v. Zinsmeyer Trusts Partnership*, 187 F.3d 988 (8th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000). In *PaineWebber*, a securities arbitration panel had dismissed claims for securities fraud and market manipulation brought by the defendant. Thereafter, PaineWebber brought an action to confirm the arbitration decision, and the defendant moved to vacate. The district court vacated the arbitration award on the ground that it was procured by "undue means" within the meaning of the Federal Arbitration Act, 9 U.S.C. § 10(a)(1), because PaineWebber allegedly withheld four allegedly privileged documents from discovery during the arbitration. *Id.* at 989.

In reversing the district court with instructions to reinstate the arbitration award, the Eighth Circuit determined that PaineWebber had a reasonable basis for asserting that the attorney-client privilege and possibly the work product doctrine protected the documents at issue. *Id.* at 991-92. In so ruling, the Eighth Circuit discussed at length the function of privilege logs under Rule 26(b)(5), and the obligation of parties when faced with what could be characterized as inadequate descriptions of documents:

> [A] party wishing to invoke the privilege in responding to document discovery must assert it as to all documents to which it may apply. Whether a document is in fact privileged can be a difficult question, and if the parties engaging in discovery cannot resolve the issue informally, it must be decided by the tribunal conducting the proceeding in which the privilege has been asserted. The party seeking discovery cannot see the allegedly privileged documents – that might waive the privilege – so the dispute is usually resolved by submitting them to the tribunal *in camera*. This is an awkward, time-consuming process. To make the process work, and to encourage parties to minimize the number of documents that must be reviewed *in camera*, most tribunals require the party asserting the privilege to provide the parties seeking discovery with a list or log that describes the document without disclosing the allegedly privileged communications it contains. This practice is now codified in the Federal Rules of Civil Procedure, *see* Rule 26(b)(5) (1993), and it was used by the panel of arbitrators in this case.
>
> . . . [W]hen a party claims that certain documents are privileged and provides a list or log of those documents, the other party, the one seeking discovery, must take the initiative, for if the party seeking discovery does not press for *in camera* review of a particular document, the process ends with the claim of privilege *de facto* upheld. Because privilege disputes can only be resolved by *in camera* review of a document, formal resolution of such disputes is tedious and difficult. When many documents are at issue, the tribunal will of course want the party seeking discovery to limit the number it challenges. The tribunal ultimately decides what information must be disclosed on a privileged document log. Because that log is the basis upon which the party seeking discovery decides

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> whether to request *in camera* review of a particular document, when the disclosure is inadequate – for example, PaineWebber's use of blue sheets to replace allegedly privileged documents in the compliance officer's file – the party seeking discovery must either demand *in camera* review of all documents, or ask the tribunal to require greater disclosure on the log. While this awkward process may seem to present the opportunity for a party to 'hide' damaging documents by providing a deceptive or inaccurate privileged document log, inadequacies in the log will become apparent to the tribunal if the party seeking discovery demands *in camera* review of some documents, and stiff sanctions may be imposed on a party whose log is found to be inaccurate or dishonest.

Id. at 992.

The Eighth Circuit ultimately held that PaineWebber had not employed "undue means" in asserting that some of its documents were privileged. The court held that, in response to Zinsmeyer's discovery requests, PaineWebber had individually identified each allegedly privileged document on a 347-page log, and showing with a blue sheet where others appeared in the compliance officer's file. The court stated that this gave Zinsmeyer a basis for determining whether to request that some or all of these documents be submitted for *in camera* review of the asserted privilege. *Id.* at 992-93. The court briefly described the privilege log entries for the documents at issue, which consisted of short descriptions such as "memo re Reik Compliance Issues." One entry mistakenly identified the attorney as author of certain notes when in fact the notes were of a meeting with the attorney taken by the client's representative. *Id.* at 993. The court held that any mistakes PaineWebber made in preparing its privilege log did not seem to reflect intentional misconduct, and that they were "the types of errors and oversights that are apt to attend the process of claiming privilege for a large group of corporate documents." *Id*. at 994. Furthermore, the court observed that, if Zinsmeyer had believed that the descriptions on the privilege log were inadequate, or that documents replaced with a blue sheet should be described, it could have asked the arbitration panel to order PaineWebber to supplement its log and then pressed for a ruling on that request. *Id.* at 994 n. 1.

Several lessons may be drawn from the *PaineWebber* decision. First, it is clear that the time to challenge the adequacy of a privilege log entry is not when the matter is on appeal to the Eighth Circuit. Second, the Eighth Circuit has advised the practicing bar of its view that privilege disputes ultimately must be resolved by *in camera* inspection (in the absence of a waiver). *Id.* at 992. Third, the Court expects the parties to first attempt informal resolution of perceived inadequacies in the privilege log before Court intervention. Furthermore, in cases where large numbers of documents are claimed to be privileged or protected, the Court expects that the party seeking discovery will act in good faith to limit the number of documents it seeks to challenge. *Id.*

Finally, the Eighth Circuit stated that it views the privilege log as a starting point for the party seeking discovery to determine which documents should be submitted for *in camera* review of the asserted privilege. *Id*. at 992. Because the Zinsmeyer Trust Partnership never actually challenged the adequacy of the privilege log entries or asked for an *in camera* review by the panel of arbitrators, however, the *PaineWebber* decision is silent as to whether the privilege log entries were inadequate, the consequences of an inadequate entry to the party, and the timing of the submission of any affidavits or deposition testimony that might be used to carry the burden of persuasion on the applicability of the privilege. In other words, the purpose of the privilege log is to allow the party seeking disclosure to determine which documents should be submitted for *in camera* review of the asserted privilege or protection. In this instance, *PaineWebber* can be read as suggesting that the privilege log functions as the "prima facie" showing of the party asserting the privilege, who will ultimately be required to produce additional evidence to support the claim of privilege as to each document if and when that claim is challenged. *See AT&T Corp. v. Microsoft Corp.*, 2003 WL 21212614, p. 2 (N.D. Cal. 2003). If that is the purpose of the log, then arguably any supporting affidavits or deposition testimony should not be required until the documents that are to be submitted *in camera* have been identified. This certainly seems a

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reasonable procedure when there is a voluminous document production such as in the *PaineWebber* case. It arguably would have been unduly burdensome for PaineWebber to submit affidavits or supporting deposition testimony for all documents listed on its 347-page privilege log at the time the privilege log was produced, especially when the applicability of the privilege was ultimately challenged (albeit on appeal) as to only four documents. On the other hand, when the total number of documents withheld is small in number, submission of well-crafted explanatory affidavits or deposition testimony at the time the privilege log is provided may in some instances produce the tactical advantage of dampening the enthusiasm of the party seeking discovery to challenge the claims of privilege.

To some extent, however, this interpretation may seem contrary to the express text of Rule 26(b)(5), which states that the description must be sufficient to "enable other parties to assess the applicability of the privilege or protection." Given that the Eighth Circuit has concluded that privilege disputes can only be resolved by *in camera* inspection, *PaineWebber*, *supra*, 187 F.3d at 992, when the party seeking discovery concludes that the privilege log entries are inadequate or that a claimed privilege or protection does not exist based on the information provided in the log, that party may decide to move for immediate *in camera* inspection, rather than ask the court to require greater specificity on the privilege log. Indeed, such a motion may be the procedure of choice when the number of documents contained on the privilege log is small in number. Whether such a motion would serve to terminate the ability of the party asserting the privilege to supplement its privilege log with explanatory affidavits or deposition testimony at that point is left unanswered by the case law to date.

When informal attempts at resolving alleged inadequacies in a privilege log have failed, and preferably before being confronted with a motion for immediate *in camera* inspection (perhaps denominated as a motion to compel immediate production on the grounds that the party withholding documents has not established an adequate basis for assertion of the privilege), it is suggested that the party asserting the privilege seek a protective order under Rule 26(c). The purpose of such a protective order is to determine whether greater specificity should be required in the privilege log descriptions, and, if so, to ask the court to provide guidance on what is necessary to meet the court's standards; to establish deadlines for the submission of explanatory affidavits, deposition testimony, and other materials to support the claims of privilege on those documents that are challenged by the adversary; and to establish a procedure for the *in camera* inspection. Particularly when the party asserting the privilege contends that its privilege log descriptions are adequate, the use of protective orders seems necessary in protecting the rights of all parties while establishing an expeditious method for handling these disputes, depending on the circumstances of each case.

3. Drafting Adequate Privilege Log Descriptions That Do Not "Reveal Information Itself Privileged Or Protected."

The description of the nature of the documents not produced or disclosed must be drafted in a manner that does not reveal "information itself privileged or protected," while being sufficient to enable the other parties to assess the applicability of the claim of privilege or protection. Fed. R. Civ. P. 26(b)(5). Certain documents by their very nature may defy a detailed or specific privilege log description without revealing "information itself privileged or protected." For this reason, the court ultimately decides how much detail is required in a privilege log.

The case law provides guidance regarding the degree of specificity that arguably need not be included on a privilege log entry:

> A description of legal memoranda usually need not specify particular avenues of research or strategy considered, or provide information that otherwise indicates the direction of thinking of party or its counsel;
>
> A description of any correspondence between attorney and client arguably need not recite the specific nature of an engagement of counsel or the precise services provided by counsel;
>
> A detailed description of the precise directions given to or suggested by counsel as a matter of legal strategy or potential course of action likely need not be provided;
>
> A description of any intangible work product; and
>
> A description of any tangible work product that indicates the direction of thinking or strategy of party or its counsel.

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Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir.) (adversary not entitled to information that reveals the nature of the client in seeking representation, the nature of legal research conducted or legal strategy pursued; legal bills that identified federal statutes researched held privileged unless waiver is found), *cert. denied,* 528 U.S. 891 (1999); *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999) (attorney-client privilege protects against disclosure of specific nature of services performed, such as researching particular areas of law); *see also State ex rel. Atchison, Topeka & Santa Fe Railway Co. v. O'Malley*, 898 S.W. 2d 550, 554 (Mo. banc 1995) (suggesting that counsel would be required to identify names of persons from whom tangible recorded witness statements were taken, although intangible work product regarding notes specifying names of persons participating in non-recorded oral interviews need not be described with particularity).

The argument can be made that there should be no need to provide a privilege log description to protect legal memoranda because it is impossible to prepare such an entry with any specificity without revealing information itself privileged or protected. The same argument could be applied to a request for written or recorded statements. For example, revealing the existence of a recorded statement from a particular witness discloses a level of diligence in investigating the underlying claim, and, to some extent, the relative weight attributed to that witness by the opposing side. *O'Malley, supra, id*. Nevertheless, a certain amount of information about the creation and existence of the statement from that witness will be required to be disclosed in order to support the claim of privilege and to allow the adversary to assess the claim of privilege. For example, a log entry that reads: "statement from witness taken in anticipation of litigation" will likely be insufficient to meet the standard of Rule 26(b)(5) for assessing the applicability of tangible work product protection. The entry will at least have to identify the name of the witness and provide some factual explanation as to the circumstances surrounding the creation of the statement to justify the claim that the statement was prepared in anticipation of litigation and not in the ordinary course of business.

Similarly, a description stating only: "Legal research memo re: claim" will arguably fail to meet the threshold level of particularity under Rule 26(b)(5). However, an entry that recites: "Correspondence from outside counsel Jones to Executive Vice President Smith transmitting copy of legal research memorandum relevant to certain potential legal issues on new widget product line prepared by outside counsel Jones' Associate, and discussing potential legal strategies for addressing these issues," probably has a better chance of passing muster, at least as an initial privilege log entry. The entry does not identify the legal issues that are the subject of the research memorandum, nor the specific legal advice provided in the accompanying letter. However, it alerts the opposing party and the court that counsel's mental impressions, opinions, and legal advice concerning the widget product line are contained in the memo and transmitting letter. When supplemented with affidavits or deposition testimony concerning the circumstances surrounding the creation of the memo, an *in camera* inspection (if sought by the adversary) may provide the court with sufficient information to rule upon the applicability of the privilege.

Privilege log entries should also provide some explanation as to the reasons particular documents are covered by the attorney-client privilege or are entitled to work product protection when attorneys do not appear to be listed as authors or recipients of the document. Such explanations are also appropriate when the persons otherwise involved in the creation or receipt of the document appear to be outside the scope of individuals normally within the privilege relationship. Although these types of explanations ultimately must be supported by some type of evidentiary showing beyond the explanation of the privilege log, this information is probably warranted for inclusion to sustain the threshold showing necessary under Rule 26(b)(5). For example, documents that discuss potential legal strategies are entitled to work product protection, even if "non-legal personnel" author them. *See, e.g., Simons v. G. D. Searle & Co.*, 816 F.2d 397, 400-02 (8th Cir.) (corporate risk documents prepared by non-lawyer corporate officials could be considered protected work product if they disclose the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim), *cert. denied,* 484 U.S. 917 (1987); *United States v. Adelman,* 68 F.3d 1495, 1501 (2d Cir. 1995) (opinion work product immunity now applies equally to lawyers and non-lawyers alike); *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1219 (4th Cir. 1976) (same). Moreover, documents subject to the attorney-client privilege may be transmitted between non-attorneys, particularly individuals involved in corporate decision-making, so that the corporation may be properly informed of legal advice and act

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appropriately. Therefore, in situations where the client is a business entity, documents subject to the privilege may be transmitted between non-attorneys to relay information requested by attorneys. *Santrade, Ltd. v. General Elec. Co.*, 150 F.R.D. 539, 545 (E.D. N.C. 1993). Consequently, when drafting initial privilege log entries for documents created in these situations especially, sufficient detail should include the circumstances surrounding the creation of these documents and why this particular document is entitled to the privilege, even though supporting affidavits may later be submitted.

Finally, the drafter of privilege log entries should consider the type of evidence that will be submitted to the court to ultimately evaluate the assertions of privilege or protection for particular documents. As observed throughout this article, the elements of attorney-client privilege and work product protection are usually established by affidavits from individuals with personal knowledge of the relevant facts. However, authority exists for the use of *in camera* affidavits, particularly when the level of detail required to sustain the privilege may, in fact, reveal the privileged information. *E.g., Philadelphia Housing Authority v. American Radiator*, 294 F. Supp. 1148, 1150 (E.D. Pa. 1969). The court may also rely on live testimony and information gleaned from *in camera* inspection of the document itself. *Robinson v. Texas Automobile Dealers Ass'n*, 214 F.R.D. 432, 444 (E.D. Tex. 2003). The court may also rely on information contained in the privilege log, particularly when *in camera* inspection of the document itself confirms that information, s*ee Bowne of New York City v. AmBase Corp.*, 150 F.R.D. 465, 474 (S.D. N.Y. 1993) (noting that the court may rely on adequate privilege logs in allowing a party to prove the factual basis for its claims of privilege), and other information filed with the court, such as pleadings, motions, briefs and exhibits, legal memoranda, discovery responses, or other undisputed facts. *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550 (10th Cir. 1995), *cert. denied,* 517 U.S. 1190 (1996); *Int'l Telephone & Telegraph Corp. v. United Tel. Co. of Florida*, 60 F.R.D. 177, 182 (M. D. Fla. 1973). The party asserting the privilege may attempt to rely on one or a combination of these methods as long as they demonstrate all elements of the privilege.

Depending on the circumstances of the case, however, the court may require proof by specific forms of evidence. *United States v. AT&T*, 86 F.R.D. 603, 604-05 (D. D.C. 1979). Therefore, if a large number of the privilege log descriptions cannot be drafted without revealing information privileged or protected, and counsel anticipates an immediate challenge to the log entries, counsel might consider filing a motion for a protective order *before* the log is provided to opposing counsel. The purpose of such an order is to obtain a ruling on acceptable level of detail for such descriptions, but also the timing for the submission of any supporting affidavits and whether those affidavits will be considered *in camera* or must be supplied to the opposing party. A protective order in such situations may be particularly advantageous if counsel concludes the number of documents on a privilege log will be voluminous.

III. JUDICIAL RESPONSES TO INADEQUATE PRIVILEGE LOGS.

It is axiomatic that a waiver of the privilege may occur when a party fails to assert the privilege properly. *St. Paul Reinsurance Co., Ltd. v. Commercial Financial Corp*., 197 F.R.D. 620, 640 (N.D. Iowa 2000). Certainly the failure to produce a privilege log at all or the production of a log in which the document descriptions are inadequate (*e.g.,* "analysis re claim") will be sufficient basis upon which the court may hold that a waiver of any applicable privilege or protection has occurred and order disclosure of the document as an appropriate sanction. *E.g., Jones v. Hamilton County Sheriff's Department*, 2003 WL 21383332, p. 4 (S.D. Ind. 2003) (stating rule); *SmithKline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 534 (N.D. Ill. 2002) (same). Similarly, a party may run the risk of waiver or rejection of its claim of privilege or protection if the party fails to submit sufficient explanatory materials such as affidavits or deposition testimony at the appropriate time. *St. Paul Reinsurance, supra*, 197 F.R.D. at 640-42. Moreover, Judge Bennett has warned practitioners in the Iowa federal courts that when parties fail to provide adequate privilege log descriptions and compound that error by failing to submit appropriate explanatory materials – particularly after receiving a warning from the court – the court likely will not conduct an *in camera* inspection of the documents, even if such an examination might reveal information sufficient to sustain the claim of privilege or

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protection. *St. Paul Reinsurance, supra,* 197 F.R.D. at 641.

The guidepost for counsel in drafting privilege log entries is to attempt good faith compliance with a reasonable identification effort. Although the case law provides anecdotal evidence that waiver can result from inadequate log entries, the cases also reveal that most courts are reluctant to do so unless there has been what the court characterizes as a bad faith lack of a reasonable identification effort in the log itself. *E.g.*, *St. Paul Reinsurance Co., Ltd. v. Commercial Financial Corp.*, 197 F.R.D. 620, 640 (N.D. Iowa 2000) (Finding waiver of attorney-client and work product privileges when party failed to support its privilege in a timely or adequate manner following a previous court order that its privilege log descriptions were inadequate. The court stated that the party asserting the privilege "cannot place upon the court the burden of examining the propriety of their assertions of privilege in an *in camera* inspection of documents . . . where they have never properly asserted the privilege."); *United States v. Construction Products Research, Inc.*, 73 F.3d 464, 473-74 (2d Cir.) (descriptions of documents such as "facts re DOL findings," "facts: whistleblower article;" and "letter re: customer orders" did not provide sufficient information to support privilege, particularly in the absence of any supporting affidavits or other documentation), *cert. denied,* 519 U.S. 927 (1996); *Dorff & Stanton Communications, Inc. v. Molson Breweries*, 100 F.3d 919, 923 (Fed. Cir. 1996) (attorney-client privilege held waived when party failed to cure problems in privilege log after court had twice warned of party's failure), *cert. denied,* 520 U.S. 1275 (1997). Particularly when counsel is confronted with documents that may arguably defy the ability of counsel to draft a meaningful description without revealing privileged information, seeking a protective order at an early stage of the privilege assessment may assist the parties and the court in resolving the dispute.

IV. CONCLUSION.

Privilege logs are difficult to prepare, and consume significant time and client resources, especially in complex litigation where the documents to be produced and withheld are voluminous. Rules 26(b)(5) and 45(d)(2) recognize the discretion of the courts to decide each situation on an individual basis. Consequently, the individual circumstances of each case and the reasonableness of efforts of the parties to comply in good faith with an effort to supply the required information will impact greatly the manner in which that discretion is exercised.

When counsel is confronted with the daunting task of producing a privilege log in a case where the number of documents claimed to be privileged or protected is expected to be great, and the descriptions difficult to draft with specificity without revealing the privileged information sought to be withheld, motions for protective orders (in the absence of agreement with opposing counsel) can and should be utilized. The motion for protective order should attempt to secure a ruling on the level of specificity that is required for the privilege log entries, and those items which can and should be excluded (*e.g.,* specific topics of advice, specific areas researched). The motion for protective order should also seek establishment of deadlines for the production of the privilege log, deadlines for the opposing party to challenge the sufficiency of the log entries, or seek *in camera* inspection, and submission of supporting affidavits and testimony on challenged documents.

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damages award; and
(3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. at 1520, citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). The *Campbell* majority then applied these criteria to reverse the Utah Supreme Court, stating "this case is neither close nor difficult." *Id*. at 1521. The majority's detailed discussion of the guideposts provides the "marching orders" for lower courts (state and federal) as well as ample fodder for defense counsel's advocacy in punitive damages cases.

The First "Guidepost": The Reprehensibility of the Defendant's Conduct

The *Campbell* majority elaborated as follows on the first "guidepost" for due process review of punitive damages awards:

> [T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Campbell, 123 S.Ct. at 1521 (quoted internal citations omitted). The majority then made passing reference to State Farm's mishandling of the claims against *Campbell*, found that *some* punitive damages were justified, and concluded that "a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." *Id*.

Significantly, the *Campbell* majority held that the State high court erred in relying "upon dissimilar and out-of-state conduct evidence." *Id*. at 1521-22. The U.S. Supreme Court noted that States generally cannot punish the defendant through punitive damages for conduct that may have been lawful where it occurred, or for "unlawful acts committed outside of the State's jurisdiction." *Id*. at 1522. Moreover, the Court concluded that out-of-state conduct may be probative as to "the deliberateness and culpability of the defendant's action in the State" *only* where the extraterritorial conduct has "a nexus to the specific harm suffered by the plaintiff." *Id*. Specifically, the Court admonished that a defendant's "dissimilar" bad acts cannot be considered in awarding punitive damages:

> For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here.

Id. at 1523.

Practice Pointers

Iowa practitioners defending punitive damage claims should capitalize on the *Campbell* Court's "marching orders" that limit the types of evidence that can be considered in awarding punitive damages. The *Campbell* analysis – which under the Supremacy Clause of the U.S. Constitution is binding upon state and federal courts alike – supports motions in limine and new jury instructions in defending punitive damage claims.

First, defense counsel should consider motions in limine to exclude several separate, but overlapping, categories of evidence: (1) out-of-state conduct; (2) conduct that was legal where it occurred; (3) conduct that did not harm the specific plaintiff; and (4) dissimilar bad acts. A fact-sensitive analysis will be required to determine the admissibility of evidence in these categories. For example, the

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strongest case for exclusion may be made for evidence of lawful, dissimilar out-of-state conduct with no nexus to the plaintiff. Other permutations may be admissible in a given case (such as illegal out-of-state conduct connected to defendant's mistreatment of plaintiff that demonstrates the "deliberateness" of the conduct). Defense counsel should object to the admission of evidence subject to these challenges and preserve error for appellate review. Defense counsel should be wary of "opening the door" to evidence of dissimilar bad acts by offering evidence of the defendant's good deeds or good character.

In addition, defense counsel should consider submitting proposed jury instructions directing jurors to refrain from considering specific types of inappropriate evidence in determining whether to award punitive damages or in calculating the amount to award. Indeed, one of the marching orders given by the *Campbell* majority is that the "jury *must* be instructed… that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." 123 S.Ct. at 1522-23 (emphasis added). Similar instructions could be proposed as to evidence of dissimilar bad acts, illegal out-of-state conduct, or conduct not harming the plaintiff.

The Second "Guidepost": The Ratio Between Harm To The Plaintiff And The Punitive Damage Award

The Campbell majority dramatically bolstered the use of "ratios" to determine whether punitive damages awards are unconstitutionally excessive:

> We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, *few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process*.

123 S.Ct. at 1524 (emphasis added). The Court found "instructive" a "long legislative history… providing for sanctions of double, treble, or quadruple damages to deter and punish." *Id*. The Court also noted its own precedent that a 4-to-1 ratio is "close to the line of constitutional impropriety." *Id*.

Immediately after the *Campbell* decision, scholars and courtwatchers speculated whether the high court would tolerate a far higher ratio of punitive to compensatory damages where the plaintiff suffered fatal or catastrophic injuries from defendant's misconduct, noting that the Campbells suffered only economic and perhaps emotional harm from State Farm's bad faith. A bellweather case submitted May 19, 2003, was *Ford Motor Co. v. Romo*, 123 S.Ct. 2072 (2003), with a $290 million punitive damages award in a triple fatality, Ford Bronco crashworthiness case.[5] The U.S. Supreme Court remanded that case with instructions to reconsider the punitive award in light of *Campbell*. *Romo*, 123 S.Ct. 2072 (2003). A spate of similar orders by the U.S. Supreme Court on April 21, 2003, granted certiorari and vacated punitive damage awards, remanding a variety of types of cases "for further consideration in light of *State Farm [v. Campbell]*."[6] Accordingly, the *Campbell* guidelines apply to punitive damages award regardless of the theory of liability.

Practice Pointers

Campbell clearly bolsters the likelihood of success of post-trial motions or appellate review to vacate or reduce punitive damages awards that are ten times or more greater then the compensatory award. Pre-*Campbell* Iowa Supreme Court precedent had downplayed the significance of ratios,[7] but *Campbell* is now the law of the land. Although both sides have room to argue different ratios should apply under different facts, post-*Campbell* punitive damage verdicts with a double digit or greater ratio to compensatory damages are far more vulnerable to challenge. Defense counsel should consider proposing jury instructions that any punitive damages award must bear a reasonable relation or proportion to the plaintiff's damages actually caused by the defendant's punishable misconduct.

Language in the *Campbell* majority opinion also diminishes the significance of a defendant's wealth in supporting a larger punitive damages award. The majority pointedly observed, "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." 123 S.Ct. at 1525. The majority also observed parenthetically, "[W]ealth cannot make up for the failure of other facts, such as 'reprehensibility', to constrain significantly an award that purports to punish a defendant's conduct." *Id*. (quoting Justice Breyer's concurrence in *Gore*, 517 U.S. at 585). The majority rejected the Utah Supreme Court's reliance on State Farm's "enormous wealth" as a justification for the size of the punitive damage award, noting that those assets "are what other insured parties . . . must

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[5] ABA Journal June 2003 at 27.

[6] *See, e.g., Anchor Hocking, Inc. v. Wadill*, 123 S.Ct. 1781 (2003) (personal injury-products liability case with punitive damages awarded at more than ten times compensatory damages); *Key Pharmaceuticals, Inc. v. Edwards*, 123 S.Ct. 1781 (2003) (same); *San Paolo U.S. Holding v. Simon*, 123 S.Ct. 1828 (2003) (property sale dispute with 340:1 ratio); *DeKalb Genetics Corp. v. Bayer CropScience, S.A.*, 123 S.Ct. 1828 (2003) (patent infringement case with 3.3:1 ratio).

[7] *See, e.g., Wilson v. IBP, Inc.*, 558 N.W.2d 132, 148 (Iowa 1996) ("Of minor significance is the ratio between the compensatory and punitive damages assessed"); *Ryan v. Arneson*, 422 N.W.2d 491, 496 (Iowa 1988) (expressly rejecting use of a mathematical ratio in examining punitive damages); *see also, Condon Auto Sales Service, Inc. v. Crick,* 604 N.W.2d 587, 595 (Iowa 1999) (affirming judgment for punitive damages with a 43 to 1 ratio to actual damages).

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rely upon for payment of claims [and] had little to do with the actual harm sustained by the Campbells." 123 S.Ct. at 1525.

Campbell thereby undermines Iowa appellate precedent allowing consideration of a defendant's size and wealth to support a higher punitive damage award.[8] Accordingly, defense counsel should consider submitting a proposed jury instruction that a larger punitive award should not be imposed simply because of a defendant's size or wealth. Moreover, after *Campbell*, defense counsel probably can object to jury instructions that allow consideration of the defendant's financial condition in determining the amount of punitive damages to award. See Iowa Uniform Civil Jury Instruction 210.1 (allowing jurors to consider "all of the evidence including… the amount of punitive damages which will punish and discourage like conduct by the defendant in view of [his] [her] [its] financial condition."); *but see, Eden Electrical, Ltd. v. Amana Co., L.P.*, 258 F.Supp.2d 958, 971-75 (N.D. Iowa 2003) (analyzing *Campbell* to conclude wealth remains a factor).[9] Furthermore, defense counsel should consider moving in limine to preclude plaintiff's counsel from arguing defendant's wealth in support of a larger punitive award (*i.e.*, "How much money does it take to send this multi-billion dollar corporation a message?")

The Third "Guidepost": The Disparity Between The Punitive Damages Award And Civil Penalties Allowed In Comparable Cases

The *Campbell* Court spent little time on this factor, noting that "[t]he most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, . . . an amount dwarfed by the $145 million punitive damages award." 123 S.Ct. at 1526. The *Campbell* majority admonished the Utah Supreme Court for speculating about State Farm's potential loss of licensure and disgorgement of profits based on out-of-state and dissimilar conduct the Utah court erroneously considered in determining the amount of punitive damages, as discussed above. *Id.* The *Campbell* majority also backed away from precedent considering *criminal* penalties in reviewing the propriety of a punitive damage award:

> When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Id.

Practice Pointers

The foregoing language supports a motion in limine to preclude plaintiff's counsel from referring to criminal penalties in arguing for a punitive damage award. For example, in a wrongful death case, plaintiff's counsel might otherwise refer to penalties of imprisonment and fines for vehicular manslaughter. Such argument should not be allowed in the post-*Campbell* world. Motions in limine and proposed jury instructions precluding use of evidence of dissimilar and out-of-state conduct could also forestall efforts by plaintiff's counsel to rely on the greater civil penalties based thereon in justifying a higher punitive damage award.

CONCLUSION

Anecdotal reports suggest that *Campbell* is already facilitating settlement of punitive damage awards in Iowa. Courts in Iowa are only beginning to apply *Campbell* in adjudicating punitive damages claims. *See, e.g., Baker v. John Morrell & Co.*, ___ F.Supp.2d ____, 2003 WL 21355198, *44-46 (N.D. Iowa June 11, 2003) (applying *Campbell* to approve punitive damage award in employment case after reduction to statutory cap of $300,000, three times the compensatory award); *Eden Electrical*, 258 F.Supp.2d at 975 (applying *Campbell* to reduce punitive damage award in dealer termination case from $17.875 million to $10 million on fraud claims with compensatory damages of $2.1 million). Defense counsel should take full advantage of the *Campbell* "marching orders" to help shape the development of punitive damages jurisprudence in the months and years ahead.

[8] *See, e.g., McClure v. Walgreen Co.*, 613 N.W.2d 225, 231-33 (Iowa 2000) (approving consideration of defendants "worldwide" financial condition in setting punitive damage award, and approving Iowa Civil Uniform Jury Instruction No. 210.1); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 148 (Iowa 1996) (defendant's financial position is proper factor for assessing imposition of punitive damages); *Midwest Homes Distributor, Inc. v. Domco Industries, Ltd.*, 585 N.W.2d 735, 743 (Iowa 1998) (affirming $750,000 punitive damages award, noting absence of "glaring disparity between that amount and defendant's assets exceeding $250 million).

[9] Presumably the Iowa Jury Instruction Committee will revisit uniform punitive damages instructions in light of *Campbell*.

THOUGHTS ON DEFENSE OF THE EMPLOYMENT CLAIM . . . *continued from page 4*

addressed is not ordinarily a "hanging" offense, check to determine if a progressive disciplinary approach was followed. If not, understand that this will be an obstacle that will need to be overcome;

- Consider the timing of any employment action, especially termination. A precipitous termination can be dangerous and is likely to produce employment claims. Even where the employer's window for action was open, it can close. It is similarly risky to fire an employee six months after the event that clearly would have justified termination.

Responding to the Administrative Claim

Although most administrative claims of discrimination do not ripen into litigation, with few exceptions a plaintiff cannot commence discrimination litigation unless and until the employee presents the claim to an administrative agency for review and investigation. A lawsuit, if any, cannot be commenced until after a right to sue letter has been issued by the agency and, then, must be filed within 90 days. *See* 42 U.S.C. §2000e-5(f)(1); Iowa Code §216.16(1), (3). The last step before litigation is almost always participation before a federal, state or local agency.

The administrative process presents the employer an opportunity and a potential trap. If response to the charge of discrimination at the administrative level is not taken seriously, there is a possibility of substantial risk. Ultimately, the position the employer takes in response to the charge (and the details of its response) will serve as the basis for the defense of any litigation that may later result. Counsel should assist in coordinating responses to the administrative agency's requests and in helping to develop those answers.

Litigation may not be resolved for some time. Failure to carefully and fully develop the factual information before the agency can do much to damage the employer's credibility once the case progresses to court. Witnesses who are not identified by the employer in the agency proceeding will automatically be subject to challenge in court. Erroneous supporting information that cannot be buttressed with specifics will be used against the employer and may become the focus of the case and will likely contribute to an unsuccessful result. Reasons for the employer's actions that arise only after the lawsuit is filed will be hard to sell in court.

Although the administrative process poses potential problems, it can be used to the employer's advantage. To the extent an employer obtains and presents to the agency relevant information, that evidence will be preserved and maintained and its credibility will be bolstered by consistency. Statements from witnesses (whether produced to the agency or held by the employer as work product) will help to establish facts for the case and will later be less subject to erosion or manipulation. These matters can be vital considering that it may be several years before the case ultimately comes to trial and important witnesses may no longer be available or as willing to assist. Moreover, to the employer who takes the agency proceeding seriously, there may also be an opportunity to obtain comparative advantage. Frequently, the employee making the charge is not represented by counsel. Frequently, also, the employee fails carefully to articulate his or her position or provides inconsistent and contradictory information to the agency. All such information is documented and can be used effectively later in the litigation.

THE EMPLOYMENT LAWSUIT

Insurance

One of the first steps in addressing employment litigation should be to determine whether insurance coverage may be available. Ideally, the employer should notify the carrier as soon as a complaint has been made with an administrative agency. Some carriers take the position that such a charge of employment discrimination does not constitute a "claim" within the meaning of the policy language. In those circumstances, written notification of the carrier of the existence of the charge of discrimination and insistence upon a written response (that the charge does not yet constitute a "claim") can protect the employer's interests. When and if litigation is later commenced, the employer can resubmit the matter to the carrier.

Other carriers, however, take a different approach. Under some policies, a "claim" is deemed to exist when an administrative charge of employment discrimination is filed. In those circumstances, the carrier may argue that the employer's failure to notify the carrier at the administrative level somehow constitutes a waiver of coverage. In such situations, questions of prejudice ordinarily will govern. Usually, the insurer will not be able to prevail with an argument that its position has been harmed by delay in notification. It is important to note, however, that some carriers may take the position that lack of notice of the administrative charge somehow disentitles the employer to coverage in the lawsuit.

Frequently, policy coverage questions

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THOUGHTS ON DEFENSE OF THE EMPLOYMENT CLAIM . . . *continued from page 17*

arise from a given set of circumstances. Most insurance policies contain some sort of "intentional act" exclusion. Some new policies now specifically address and provide coverage for employment discrimination claims. Even those, however, have technical exclusions that may be involved in a given case. Even where no employment practices coverage exists, claims may result in some coverage. Where there is a coverage question, the employer may still be able to successfully tender the defense of the lawsuit. Even if the insurer denies the duty to indemnify, due to acceptance of the duty to defend, the expense of litigation will still be meaningful.

Conflicts of Interest

Employment cases are frequently filed against multiple defendants. Necessarily, questions arise immediately regarding the issue of possible separate representation. Ethical questions concerning single versus separate representation of defendants in employment cases must be considered. Beyond ethical issues, however, practical issues and concerns also must be addressed.

Although it may be less expensive in the short run to have one attorney represent all defendants in employment litigation, that approach can sometimes cause problems later. Ordinarily, an alleged "wrongdoer" is sued along with the employer. Questions of individual liability may exist side by side with other issues in the case. Single representation tends to blur the lines and the various legal issues and may call into question the employer's objectivity. Employer objectivity may be one of the ultimate issues to be addressed in the case. Separate representation helps to avoid the employer being tarred with the same brush as the alleged wrongdoer. Separate representation also will help in presenting affirmative defenses and may well assist in the successful defense of punitive damage claims.

Not every case, however, requires separate representation. Obviously, rather subtle conflict of interest questions may be presented but that is not always the case. Moreover, separate representation will certainly cost more. Even if an employer concludes that the individual defendant can and should be fully supported and can be represented by the same attorney, it is vital that the employer communicate in writing to the employee that the employee has the right to retain separate counsel.

In circumstances in which the employer and its attorney decide that separate representation is appropriate or necessary, the employer may wish to retain counsel for the individual employee. Clearly, the employee should be advised that the employer under such circumstances does not have control over the employee's defense. On the other hand, as a practical matter, it will be far easier to preserve the possibility of a unified defense if the employee has counsel retained by the employer.

Forum Selection

Employment discrimination cases are frequently filed in state court. Much of the law governing such claims, however, is federal. To the extent that a plaintiff asserts federal claims, serious consideration should be given to removing the lawsuit to federal court. A number of factors favor such an approach.

- The law relating to employment discrimination or other federal rights is more fully developed on a federal level. The federal courts are more familiar with dealing with employment issues.
- As long as federal claims are asserted, trial to a jury will be available in state or federal court. Under the Civil Rights Act of 1991, 42 U.S.C. §1981a(c), jury trial is now available in federal court. Jury trial, however, is not available under the Iowa Civil Rights Act. *See Smith v. ADM*, 456 N.W.2d 378 (Iowa, 1990).
- Where a lawsuit is filed in an urban county in state court, removal to federal court will broaden the jury pool in a manner that may favor the defendant.
- In federal court, a judge is assigned to the case once it is filed. In state court, at least in many districts, it will not be possible to determine which judge will be responsible for the case until shortly before the trial commences. Where there is a possibility of summary judgment being requested, the judge addressing the summary judgment motion in state court likely will not be the same judge who will have the obligation to try the case if summary judgment is not granted.
- Some lawyers feel that federal courts are more likely to grant summary judgment than are state courts.
- Federal evidentiary or discovery rules may be preferable for defendants to some state rules. *See*, e.g., Iowa Code §668.15.
- Federal scheduling requirements and case management rules may present challenges that make state court more comfortable for lawyers who do not practice regularly in federal court.

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THOUGHTS ON DEFENSE OF THE EMPLOYMENT CLAIM . . . *continued from page 18*

Discovery

Informal Discovery. Immediately upon learning of the initiation of the lawsuit, employers should take steps to gather informally all information available. The following sources of information should be considered:

- The defendant should obtain the complete state administrative agency file, once the administrative release/right to sue notice has been issued. Iowa Code §216.16(2). A freedom of information request to the federal Equal Employment Opportunities Commission is also appropriate. The plaintiff will have submitted information to the administrative agencies. Having all of that information early can provide a head start, even the answer to the initial pleading.
- The attorney handling the matter should contact employee or supervisory witnesses for informal interviews. With respect to non-supervisory employees, the employer should assume that communication is discoverable and will ultimately get back to the plaintiff and his or her attorney. In this regard, some caution is appropriate.
- In obtaining documents that may be relevant to support the defendant's case, think as broadly as possible. For example, plaintiff's e-mail communications may provide a source of relevant inquiry. The employer will have the employee's personnel file as set forth in Iowa Code Chapter 91B. In addition, however, there are a large number of other potential documents that may relate to the plaintiff but are not in Plaintiff's personnel file. Supervisors may have maintained notes or records that will necessarily be a part of the lawsuit. "Official" company documents, such as employee handbooks, policies and affirmative action plans will also be of assistance.

Paper Discovery. Paper discovery is important in employment discrimination cases and should be started immediately. The request for production should be as broad as possible to cover all issues in the case. The following documents should be requested from plaintiff:

- All diaries, calendars, notes or documents in any way relating to employment or any known witnesses.
- All records relevant to any unemployment compensation proceeding, including job search information. The employer should consider obtaining a copy of any transcripts of the unemployment compensation hearing. Sworn testimony in the unemployment case may serve as important for cross examination.
- Complete medical and counseling records. Emotional distress issues are frequently a part of employment cases. Medical records will provide very useful information concerning causation.
- Personnel records from all other employers.
- Tax returns and documents relative to unemployment compensation or insurance benefits.

With one significant exception, contention interrogatories rarely accomplish much in employment litigation. Answers are drafted by lawyers, not litigants. Information sought in interrogatories should be limited to those areas involving specific information that can be checked and which can serve as the basis for further inquiry. The exception relates to the "legitimate nondiscriminatory reason(s)" the employer claims to support the employment decisions that prompted the litigation. Plaintiffs routinely and effectively use an interrogatory to elicit this information. If the answer differs from that offered in contemporaneous documents, in the administrative process, in deposition or at trial, the plaintiff's case necessarily improves significantly. Respond to any such interrogatory carefully.

Protective Orders. Protective orders can be important where the plaintiff requests information that is confidential or proprietary. Frequently, the plaintiff will seek personnel and employment records and files relating to a number of other persons. Such requests implicate privacy interests of the individuals affected. Usually, however, such information will be relevant to the case. In such situations, protective orders will be necessary with respect to such documents.

Dispositive Motions

Summary judgment may, or may not, be a possibility in a given case. It is true, however, that a huge body of law has arisen addressing those circumstances in which summary disposition of employment claims is appropriate. Because of the overlapping, varied and diverse legal theories and requirements available in employment claims, there are usually several issues on which, in the right case, summary judgment would be appropriate. In most cases, the decision to pursue summary judgment will be primarily based on the plaintiff's deposition. Summary judgment might be

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THOUGHTS ON DEFENSE OF THE EMPLOYMENT CLAIM . . . *continued from page 19*

considered on any one or more of the following issues:

- The timeliness of plaintiff's administrative charge of discrimination.
- The timeliness of the lawsuit following receipt of the administrative release/notice of right to sue.
- Whether plaintiff's conduct reflects that the he or she subjectively was offended by the conduct alleged to constitute sexual harassment. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).
- Whether the conduct at issue is sufficiently severe and pervasive to affect a term or condition of employment--i.e. an environment that a "reasonable person would find hostile or abusive". Id.
- In hostile environment cases, whether the employer has established the elements of the affirmative defense as set forth in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998).
- The status of defendant as an "employer" under the applicable statute.
- Legal viability of claims against individual defendants.
- In cases involving allegations of constructive discharge, whether the plaintiff can prove constructive discharge—that the "employer deliberately renders the employee's working conditions intolerable and thus forces [him or her] to quit [his or her] job", that the employer's actions were "intended to force the employee to quit" and that a "reasonable person would find the working conditions intolerable." *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998) (emphasis added); *Howard v. Burns Bros.*, Inc., 149 F.3d 835, 841 (8th Cir. 1998); *First Judicial District Department of Correctional Services v. Iowa Civil Rights Commission*, 315 N.W.2d 83, 87 (Iowa 1982).
- Whether or not there exists sufficient "after acquired evidence" to foreclose plaintiff's claims (or a portion of them). *McKennon v. Nashville Banner*, 513 U.S. 352 (1995).
- In disability discrimination cases, whether or not the plaintiff meets the numerous statutory definitional requirements in order to be a protected individual—a "qualified individual with a disability". 42 U.S.C. §12112(a). *See, e.g., Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681 (2002); *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S.Ct. 2162 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516, 119 S.Ct. 2162 (1999).
- In Family and Medical Leave Act litigation, whether the plaintiff's absences are attributable, as required, to a "serious health condition". 29 U.S.C. §2611(11). *See, e.g., Thorson v. Gemini*, 998 F.Supp. 1034, 1036-38 (N.D. Iowa 1998) (Melloy), following remand, 123 F.3d 1140, 1141 (8th Cir. 1997).

Offer of Judgment

Consideration should be given to attempting to force possible settlement through judicious use of an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure or Iowa Code §677.7. In many employment discrimination cases, the potential for an award of attorney's fees drives settlement value. Under *Marek v. Chesny*, 473 U.S. 1, 9-10 (1985), where an offer of judgment under Rule 68 exceeds the ultimate judgment rendered after trial, plaintiff will not be entitled to attorney's fees incurred after the offer of judgment. An offer of judgment that carefully considers liability and damage issues can effectively cut off the running of attorney's fees and place the entire risk of proceeding further entirely upon plaintiff and his or her counsel. This approach can force a recalcitrant plaintiff and the plaintiff's lawyer to be reasonable.

Offer of Reinstatement

An unconditional offer of reinstatement can cut off the accumulation of monetary damages under *Ford Motor Company v. EEOC*, 458 U.S. 219 (1982). The offer, however, cannot be contingent upon dismissal of the lawsuit and must be for a position of comparable responsibility, pay and benefits. Usually, the plaintiff will not accept even an unconditional offer of reinstatement. Even so, economic loss will end with the offer. It remains a tool for the defense of employment cases.

CONCLUSION

Despite the diversity and large number of potential legal theories on which a plaintiff can rely in employment litigation, there are elements common to most, if not all, such lawsuits. Obviously, defense counsel must navigate carefully the particular facts and legal elements of the specific case. At the same time, counsel who is not sufficiently sensitive to common obstacles or opportunities likely will fail.

PRESIDENT'S MESSAGE . . . *continued from page 2*

demonstrate to the court how our clients' position is fair and just and how the court's decision fits in the context of a longer view of judicial precedent. Our work matters. The work of young defense lawyers in our firms matters. We work in a state where cases get tried, decided and appealed every day. Young defense lawyers have the opportunity to serve this vital role in Iowa more quickly, more readily and more regularly than many other states.

4. We have a good relationship with the plaintiffs' bar. There are many fair and honorable plaintiffs' lawyers in our state who are every bit as competent, prepared and professional as we. They fight hard for their clients, but do so in the spirit of our profession. They work together with us day in and day out in such legal organizations as the Iowa State Bar Association and the Iowa Academy of Trial Lawyers. They serve with us on civic and philanthropic boards and organizations in our communities. Not only is our good relationship with the plaintiffs' bar critical to the administration of justice in our state, but it also helps make the trial practice a rich and rewarding profession. In many other states and jurisdictions across the country, the relationship between the plaintiffs' and defense bar is much more contentious and strident. Thankfully, this is not the case in Iowa.

We have all chosen to work in a very challenging field. We are fortunate to be involved in the trial practice in Iowa. I am certain you can think of many other reasons why talented young lawyers should come to Iowa and defend cases in your respective firms. Share them. Recruit these lawyers to Iowa. We will all be much the better for them.

Very truly yours,

J. Michael Weston
President,
Iowa Defense Counsel Association

IDCA would like to congratulate Editorial Committee member Bruce Walker who became a Grandpa on August 10, 2003. Breanne Marie Walker was born at 1:29 p.m.

Congratulations Grandpa Walker!

EDITOR'S CONCERNS . . . *continued from page 24*

I have some concerns. During the life of any litigated case, there is an opportune time for mediation. I have observed that mediations' that occur too quickly often are gambling with what I refer to as mediation risk factors. The mediation risk factors are those unknown facts and credibility evaluations that are significantly reduced as cases progress through discovery. Premature mediations result in defense cost dollars being swapped for indemnity dollars for the defense, and for the plaintiff an incomplete evaluation of the case.

Mediations that are too late oftentimes leave both sides so committed to their positions that there is no room for compromise.

Timing is critical and should be given more attention before the rush to the mediation table or the delay in getting to the mediation table. I also am concerned that we have replaced negotiations with mediations. Does every case require a third party neutral in order to negotiate a settlement? I think not, yet the popularity of mediations has made it the exclusive domain for negotiations.

Finally, we need to examine the playing field. Do we have the right people in the room to do the mediation? This is not just about authority levels. Rather you need skilled individuals who can understand the "mediation risks," evaluate them, and comprehend the trial risks associated therewith.

Mediations will continue to be a viable means of dispute resolution. We do need however, to still carry the reins in our hands to insure its success.

2003 Iowa Defense Counsel 39th Annual Meeting & Seminar

"DEDICATED TO IMPROVING
OUR CIVIL JUSTICE SYSTEM"

This year's IDCA Annual Meeting & Seminar offers up to the minute information from the bench and from the finest defense lawyers in the country. Some of the highlights of the seminar include: Defense of Punitive Damages Claims in Product Liability Cases, Confidentiality of Medical Records, Defense of Employment Law Cases, Defending Colleges and Universities, Use of Expert Testimony in a Bad Faith Case, Striving to be an Ethical Lawyer - A Look at Cicero; Defending Product Claims Under Restatement of Torts 3rd, and much more. You also will not want to miss author and retired trial lawyer Ted Borrillo's banquet speech, which will be both entertaining and enlightening. You will leave Des Moines and this seminar with fond memories, new ideas, strategies and contacts to assist you in meeting your professional goals – guaranteed!

APPROVED FOR: 15.0 Iowa CLE HOURS
(includes 2.0 hours dedicated to Legal Ethics)
6.0 Federal CLE HOURS
(State ID# 16416)

Wednesday, September 24, 2003

10:00 a.m.	Registration Open
11:00 a.m.	Board of Directors Meeting/Luncheon
12:50 - 1:00 p.m.	Welcome and Remembrance of Deceased Members Richard G. Santi, IDCA President-Elect/Program Chair
1:00 - 1:30 p.m.	Defense of Punitive Damages Claims in Product Liability Cases Richard J. Sapp Nyemaster, Goode, Voigts, West, Hansell & O'Brien, P.C. Des Moines, Iowa
1:30 - 2:00 p.m.	Current Issues Re Confidentiality of Medical Records Connie L. Diekema Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney P.C. Des Moines, Iowa
2:00 - 2:30 p.m.	Defense of Intellectual Property Claims Robert L. Fanter Whitfield & Eddy PLC Des Moines, Iowa
2:30 - 3:15 p.m.	Appellate Case Review #1 (Negligence, Torts & Indemnity) Christine L. Conover Simmons, Perrine, Albright & Ellwood, P.L.C. Cedar Rapids, Iowa
3:15 - 3:30 p.m.	BREAK
3:30 - 4:30 p.m.	How to be an Effective Advocate in Mediation Jay L. Welch Locher, Cellilli, Pavelka & Dostal LLC Omaha, Nebraska
4:30 - 5:00 p.m.	Defending Colleges and Universities Steven L. Serck Ahlers & Cooney, P.C. Des Moines, Iowa
5:15 - 7:15 p.m.	Reception in the Marriott Lobby & Tour of New Justice Building

Shuttle will be leaving the Des Moines Marriott Downtown lobby every 15 minutes for transportation to the new justice building. Tour will take approximately 40 minutes. Shuttle will return tour participants to the Marriott.

Thursday, September 25, 2003

7:30 a.m.	Registration Open
8:00 - 8:30 a.m.	Continental Breakfast
8:30 - 9:00 a.m.	Efficacy of Summary Judgment Motions in State Court & Practice Pointers Honorable Robert A. Hutchison Judge, 5th Judicial District Des Moines, Iowa
9:00 - 9:30 a.m.	Efficacy of Summary Judgment Motions in Federal Court & Practice Pointers Honorable James E. Gritzner Judge, U. S. District Court for Southern District Iowa Des Moines, Iowa
9:30 - 10:00 a.m.	Professionalism and the Iowa Rules of Professional Conduct Edward W. Remsburg Ahlers & Cooney, P.C. Des Moines, Iowa
10:00 - 10:30 a.m.	Use of Expert Testimony in a Bad Faith Case Robert V. P. Waterman, Jr. Lane and Waterman Davenport, Iowa
10:30 - 10:45 a.m.	BREAK
10:45 - 11:00 a.m.	Legislative Update: Issues Impacting the Iowa Defense Bar Robert M. Kreamer IDCA Executive Director & Lobbyist Kreamer Law Office Des Moines, Iowa
11:00 - 11:30 a.m.	The Sudden Emergency Defense in Iowa Sharon Soorholtz Greer Cartwright Druker & Ryden Marshalltown, Iowa

September 24-26, 2003
Des Moines, IA

11:30 - 12:00 a.m.	Removal: To Remove or Not to Remove - Relevant Considerations & Practice Pointers Martha L. Shaff Betty Neuman & McMahon LLP Davenport, Iowa
12:00 - 12:30 p.m.	Luncheon
12:30 - 12:40 p.m.	Annual Meeting of IDCA
12:40 - 1:10 p.m.	Report from the Federal District Court Honorable Ronald E. Longstaff U. S. District Court for the Southern District of Iowa Des Moines, Iowa
1:15 - 1:45 p.m.	Worker's Compensation Update Iris J. Post Bradshaw, Fowler, Proctor & Fairgrave, P.C. Des Moines, Iowa
1:45 - 2:30 p.m.	Appellate Case Review #2 (Civil Procedure, Courts Jurisdiction & Trial, Evidence, Insurance, Judgment, Limitation of Actions) Megan M. Althoff Wolfe Bradshaw, Fowler, Proctor & Fairgrave, P.C. Des Moines, Iowa
2:30 - 3:00 p.m.	Defending Employers Against Sexual Misconduct/Harassment Claims Elizabeth Gregg Kennedy Ahlers & Cooney, P.C. Des Moines, Iowa
3:00 - 3:30 p.m.	"Consent to Settle" Provisions in UIM Policies James A. Pugh Morain, Burlingame & Pugh, P.L.C. West Des Moines, Iowa
3:30 - 3:45 p.m.	BREAK
3:45 - 4:45 p.m.	Striving to be an Ethical Lawyer - A Look at Cicero Theodore A. Borrillo Littleton, Colorado
4:45 – 5:45 p.m.	Board of Directors Meeting
6:30 - 9:00 p.m.	Reception/Banquet – The Embassy Club (801 Grand, Des Moines, IA)
6:30 – 7:30 p.m.	Reception
7:30 p.m.	Dinner/Banquet
8:30 p.m.	Speaker: Ted Borrillo "Transitions in Life: Retirement & Poetry"

The Embassy Club is attached via skywalk to the Des Moines Downtown Marriott.

Friday, September 26, 2003

7:30 - 8:00 a.m.	Continental Breakfast
8:00 - 8:30 a.m.	Damage Arguments: Approaches and Observations Mark S. Brownlee Kersten, Brownlee & Hendricks L.L.P. Fort Dodge, Iowa
8:30 - 9:00 a.m.	Defending Civil Rights Claims Before the ICRC Honorable Mary Cowdrey Administrative Law Judge Iowa Civil Rights Commission Des Moines, Iowa
9:00 - 9:30 a.m.	Recent Developments in Employment Law Gordon R. Fischer Bradshaw, Fowler, Proctor & Fairgrave, P.C. Des Moines, Iowa
9:30 - 10:00 a.m.	Establishing the Unreliability of Proposed Expert Testimony L. W. (Bill) Rosebrook Nyemaster, Goode, Voigts, West, Hansell & O'Brien, P.C. Des Moines, Iowa
10:00 - 10:30 a.m.	Ethical Issues: Depression and Attorney Discipline David J. Grace Supreme Court Board of Professional Ethics Des Moines, Iowa
10:30-10:45 a.m.	BREAK
10:45 - 11:30 a.m.	Appellate Case Review #3 (Employment, Commercial, Constitutional, Contracts, Damages & Government) Stephen E. Doohen Whitfield & Eddy PLC Des Moines, Iowa
11:30 - 12:00 a.m.	Defending Against Consortium Claims Joseph L. Fitzgibbons Fitzgibbons Law Firm Estherville, Iowa 51334
12:00 - 12:30 a.m.	Luncheon
12:30 - 1:00 p.m.	Report from the Iowa Supreme Court Honorable Louis A. Lavorato Chief Justice, Iowa Supreme Court Des Moines, Iowa
1:10 - 1:40 p.m.	Jury Trial Innovations & Use of Technology in the Federal Courtroom Honorable Mark E. Bennett Chief Judge, U.S. District Court for the Northern District of Iowa Sioux City, Iowa
1:40 - 2:40 p.m.	Defending Product Claims Under Restatement of Torts 3rd Kevin M. Reynolds Whitfield & Eddy PLC Des Moines, Iowa
2:40 p.m.	Adjourn

EDITOR'S CONCERNS . . .

By: Noel McKibbin, West Des Moines, Iowa

Mediation

Past/Present/Future

I recall nine years ago having the opportunity to participate in the infancy of a cutting edge technique for resolution of cases. The major supporter of the process was the insurance industry. The technique was going to save millions of dollars in defense costs and reduce the temporal aspect of reserving and thus also produce significant savings for the insurance industry. The defense bar, on the other hand, was threatened, wherein, all the cases would be settled and consequently defense fees would be significantly reduced. The plaintiff bar was suspect simply because the insurers were supporting the technique. Defendants and plaintiffs were uncomfortable with the process because it was novel and a significant shift away from the traditional "Perry Mason" methodology for dispute resolution. These were the players and the ideologies that confronted the mediation process in its infancy.

Today, a whole new industry has emerged to facilitate mediation work. Its success has moved some jurisdictions, and certain segments of the law, to mandatory utilization. In a relatively short time, mediation has had a major impact on litigation.

Mediation is a wonderful opportunity for decision-makers to sit down and work toward a mutually beneficial resolution. It gives the participants the election of either sharing ownership of a result or moving toward the trial of the case.

With all of the successes of mediation, both past and present, are there any reasons why such success will not be as equally strong in the future?

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